



DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 1

[Docket ID FEMA-2017-0016]

RIN 1660-AA91

Regulations on Rulemaking Procedures

AGENCY: Federal Emergency Management Agency, Department of Homeland Security (DHS).

ACTION: Final rule.

SUMMARY: This final rule revises Federal Emergency Management Agency (FEMA) regulations pertaining to rulemaking. It removes sections that are outdated or do not affect the public and it updates provisions that affect the public's participation in the rulemaking process.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: FEMA published a notice of proposed rulemaking (NPRM) on June 7, 2017, at 82 FR 26411, proposing revisions to its regulations on rulemaking procedures. The NPRM proposed to remove outdated provisions, update provisions that affect the public, and modify FEMA's waiver of the Administrative Procedure Act exemption for matters relating to public property, loans, grants, benefits, and contracts. FEMA received five public comments in response to the

proposed rule. Two commenters, the law offices of Texas RioGrande Legal Aid, Inc. (Texas RioGrande) and the National Rural Electric Cooperative Association (NRECA), expressed concern that the proposed regulations would result in a reduction in transparency and stakeholder involvement in FEMA's rulemaking process. One comment, submitted by former research consultants to the Administrative Conference of the United States (ACUS), recommended further revisions to the petitions for rulemaking section. Two comments were unrelated to the subject matter of the rulemaking and are not the subject of further discussion below.

FEMA now finalizes the proposed regulations with some revisions made in response to the relevant comments received. FEMA describes these revisions and addresses the specific concerns of each commenter below.

Administrative Procedure Act Exemption for Public Property, Loans, Grants, Benefits, or Contracts

The Administrative Procedure Act exempts from notice and comment rulemaking matters relating to public property, loans, grants, benefits, or contracts.¹ FEMA's regulations currently waive this exemption in keeping with a 1969 ACUS Recommendation which recommended that Congress remove this exemption from the Administrative Procedure Act and that, even in the absence of legislative action, agencies should subject these matters to notice and comment rulemaking in the interest of transparency and public participation.² In the NPRM, FEMA noted that one of its main functions is to administer grant programs for emergency preparedness, response, recovery, and mitigation. FEMA proposed to modify its waiver of the exemption for three separate and independent reasons: (1) it is not feasible to go through the rulemaking

¹ 5 U.S.C. 553(a)(2).

² ACUS Recommendation 69-8, adopted October 21-22, 1969, available at <https://www.acus.gov/sites/default/files/documents/69-8.pdf>. FEMA established a regulation waiving the exemption even though the ACUS recommendation did not specifically recommend such a course of action.

process for annual grant programs, which comprise the majority of FEMA grant programs; (2) the Administrative Procedure Act does not require grant program requirements (for annual grant programs or otherwise) to be in regulation; and because (3) FEMA requires flexibility to adapt quickly to legal and policy mandates. 82 FR 26413.

Texas RioGrande submitted a comment expressing concern over this proposed modification of the waiver of the Administrative Procedure Act exemption. Texas RioGrande stated that it had consistently expressed concern about lack of transparency in FEMA's administration of its Individuals and Households Program (IHP), and that it filed lawsuits on behalf of clients in south Texas who were impacted by the use of FEMA's "unpublished rules" following Hurricane Dolly in 2008 and other disasters in 2015 and 2016. The commenter noted that it had also discussed these concerns in its comments submitted on FEMA's Individuals and Households Program Unified Guidance (IHPUG).³ The IHPUG⁴ compiled FEMA policy for each type of assistance under IHP into one comprehensive document and was intended to serve as a singular policy resource for State, local, Tribal, and territorial governments, and other entities who assist disaster survivors with post-disaster recovery. The IHPUG replaced all stand-alone IHP policies and policy statements that were previously located in FEMA documents and standard operating procedures.⁵

The commenter stated that "FEMA's current published materials do not provide anyone outside FEMA a fair idea of how FEMA decides who gets what disaster assistance." The commenter stated that FEMA's current regulations and guidance are

³ Texas RioGrande's comment on the IHPUG can be viewed at www.regulations.gov under Docket ID FEMA-2016-0011, document number FEMA-2016-0011-0085.

⁴ Note the IHPUG has been superseded by the Individual Assistance Program and Policy Guide (IAPPG) for any disaster declared after March 1, 2019. See http://www.fema.gov/sites/default/files/documents/fema_iappg-1.1.pdf.

⁵ The IHPUG can be viewed on FEMA's website at http://www.fema.gov/sites/default/files/2020-05/IHP_Unified_Guidance_FINAL_09272016_0.pdf.

“not a recipe for fair and efficient administration of any government program” and that “[w]hether in regulations or informal guidance, FEMA should provide a full and fair picture of how it makes its disaster assistance decisions, and whether it changes its standards from disaster to disaster” The commenter stated that “FEMA already keeps hundreds of its IHP standards from being accessible to the public.” The commenter expressed concern that the proposed rule would “inhibit the transparency that policy makers and the public need.”

Finally, the commenter suggested that the public interest in participation outweighs FEMA’s need for flexibility to sometimes forego notice and comment rulemaking. The commenter opined that current 44 CFR 1.4(f) and (h)⁶ include a sufficient mechanism for FEMA to bypass notice and comment in order to address emergency situations.

As an initial matter, FEMA notes that the specific contents of the IHP regulations and guidance are outside the scope of this rulemaking. As the commenter recognized, FEMA already has IHP regulations at 44 CFR 206.110 – 206.117, and has already published the IHPUG for notice and comment and made the final IHPUG available on FEMA’s website.⁷ This rule, as proposed and as finalized, would not directly affect the transparency of FEMA’s current IHP regulations or guidance. While the rule makes clear that FEMA can change the current rules without notice and comment, FEMA has no plans to remove the IHP regulations or to reduce the transparency of such regulations and guidance.⁸

⁶ Section 1.4(f) generally tracks the “good cause” exemptions to notice and comment rulemaking requirements under the Administrative Procedure Act. Section 1.4(h) relates to emergency situations and generally tracks section 6(a)(3)(D) of Executive Order 12866.

⁷ The Individual Assistance Program and Policy Guide (IAPPG) that superseded the IHPUG is also available on FEMA’s website. *See* Individual Assistance Program and Policy Guide (IAPPG), Version 1.1, May 2021 at http://www.fema.gov/sites/default/files/documents/fema_iappg-1.1.pdf. (last accessed on Nov. 4, 2021).

⁸ As FEMA noted in the proposed rule, the proposed change with respect to the grants exemption was partly intended to allow FEMA to operate certain annual grants programs without rulemaking. An annual grant program is a program for which Congress on an annual basis (1) appropriates a certain amount of

FEMA agrees with the commenter that it is important to provide fair notice of FEMA policies, but FEMA disagrees that this rule will inhibit such notice. This rule, as proposed and as finalized, has no bearing on the availability of FEMA's policies and procedures to the public. For instance, the Administrative Procedure Act and the Freedom of Information Act each contain provisions directed at the transparency of government programs. *See* 5 U.S.C. 552; 6 CFR part 5; *see also* 42 U.S.C. 5165c(c) (FEMA "shall promote public access to policies governing the implementation of the public assistance program," i.e., disaster assistance to State, local, and Tribal governments and certain private non-profit organizations). And consistent with 2 CFR part 200, FEMA posts notices of funding opportunities on www.grants.gov. *See* 2 CFR 200.203. Grants.gov provides a common website for Federal agencies to post discretionary funding opportunities and for grantees to find and apply for them. It helps the grant community learn more about available opportunities, facilitates interaction with the Federal government, and simplifies the grant application process. This rule does not affect the applicability of any of these transparency measures. FEMA will continue to provide fair notice of its policies consistent with all applicable legal requirements.

Finally, with respect to public participation, FEMA agrees with the commenter that FEMA should maintain its general policy in favor of public participation. Consistent with the proposed rule, FEMA has retained the general policy in favor of public participation in this final rule. FEMA disagrees, however, that existing regulations provide sufficient flexibility, as the agency's past experience demonstrates the challenges in issuing or revising regulations in sufficient time to support some grant programs. FEMA acknowledges that even in the absence of the Administrative Procedure Act's notice and comment exemption for rules relating to grants, FEMA may be able to avail

money for the program, and (2) potentially revises requirements associated with the program. IHP is not such a program.

itself of other exceptions to notice and comment (such as the “good cause” exception at 5 U.S.C. 553(b)(B)) when action is urgently required. FEMA prefers to avoid relying solely on such exceptions, however, because the Administrative Procedure Act makes the grants exemption available to FEMA and because some exceptions from notice and comment requirements are narrowly construed by courts. For instance, the “good cause” exception at 5 U.S.C. 553(b)(B) might not in all cases accommodate circumstances where FEMA perceives a need to bypass notice and comment in situations of an ongoing emergency such as a global pandemic, where a court applying the “good cause” standard rigorously might question whether FEMA should have acted to address a specific problem sooner. There may also be circumstances where, by virtue of multiple concurrent disasters or emergencies, there are limited regulatory development personnel to expedite multiple rulemaking projects through the notice and comment process.

With respect to the commenter’s statement that FEMA’s existing regulation at 44 CFR 1.4(h) provides an exception to notice and comment requirements, that exception is limited to an emergency situation; is more narrowly focused on requirements associated with Executive Order 12866; and calls for the preparation of additional materials for which FEMA may at times be inadequately resourced. FEMA does not believe this emergency situation exception is sufficient to ensure the flexibility needed to effectively implement its grants programs.

FEMA believes the revisions made in this rule will signal the appropriate policy intention to generally favor public participation, while providing the degree of flexibility that the Administrative Procedure Act provides and that FEMA believes appropriate.

FEMA notes that the general policy is not the only applicable law or regulation relating to public participation in rulemaking. For instance, 42 U.S.C. 5165c requires notice and comment before adopting any new or modified policy that governs implementation of the Public Assistance program and could result in a significant

reduction of assistance under the program. This statutory requirement ensures that one of FEMA's largest grant programs, the Public Assistance program, includes opportunities for public participation before any new or modified policy that could result in a significant reduction of assistance is implemented. FEMA will of course continue to abide by any legal or regulatory requirement relating to notice and comment rulemaking.

FEMA is therefore finalizing this aspect of the proposed rule without change. As noted above and in the proposed rule, however, FEMA does not anticipate a significant change in practice as a result of these amendments.

Petitions for Rulemaking

In the NPRM, FEMA proposed to revise its regulations regarding petitions for rulemaking to update and clarify terminology and to require that petitions be labeled "petition for rulemaking" or "rulemaking petition" to avoid situations where simple correspondence is confused with a petition.

FEMA received a comment from two former co-consultants to ACUS who assisted with the ACUS 2014 petitions for rulemaking project. This project resulted in ACUS Recommendation 2014-6, "Petitions for Rulemaking." *See* 79 FR 75114, 75117 (Dec. 17, 2014). The commenters approved of the revisions FEMA proposed in the NPRM but requested that FEMA make additional changes to its petitions for rulemaking regulations in accordance with Recommendation 2014-6.

The commenters proposed that FEMA should accept electronic submissions of petitions for rulemaking. FEMA's current regulations as well as the proposed regulations only provide for a physical mailing address. The commenters quoted from ACUS Recommendation 2014-6, which recommends that agencies accept the electronic submission of petitions, via email or through regulations.gov (such as by maintaining an open docket for the submission of petitions for rulemaking) or their existing online

docketing system.⁹ The commenters stated that at a minimum, FEMA should provide an appropriate and permanent email address for submitting petitions.

FEMA agrees that in most contexts online communication is more efficient than physical mail but declines to adopt a binding regulation authorizing the electronic submission of petitions at this time. FEMA believes allowing electronic submission of petitions could lead to confusion or inappropriate mass submissions without the proper infrastructure and procedures. At this time, FEMA cannot reliably support efficient online petitioning and therefore has not revised its regulations to permanently authorize the electronic submission of petitions. FEMA is open to experimenting with electronic submissions in the future, however, and has revised the regulatory text to make clear that FEMA will post to its website (www.fema.gov/about/offices/chief-counsel/rulemaking) additional acceptable methods for submitting petitions. If FEMA decides to maintain a public docket system for petitions, it will revise the above webpage to reference that docket system.

The commenters also recommended that FEMA develop a default timeline for responding to petitions or publish online individual timelines for responding to each received petition, consistent with Recommendation 2014-6, #12 and #13, and with the requirements of the Administrative Procedure Act to respond to petitions “within a reasonable time.”¹⁰ FEMA does not agree to develop a default timeline for responding to petitions. The Administrative Procedure Act requires FEMA to respond “within a reasonable time” and what is considered to be a reasonable time will vary depending on the degree of complexity of individual petitions and surrounding circumstances. The ACUS recommendations cited do not recommend that agencies issue binding regulations for these timeframes, but rather that an agency should “adopt in its procedures” a default

⁹ Recommendation 2014-6, #4.

¹⁰ 5 U.S.C. 555(b).

timeline for responding or otherwise make publicly available the timeframe by which it will respond to an individual petition.¹¹ Given limited agency resources, specific timelines published in regulation could bind FEMA in a way the underlying report nor the ACUS recommendation require, creating an undue burden on the agency.

The commenters recommended that FEMA create a way for petitioners and the public to learn the status of their pending petitions, consistent with ACUS Recommendation 2014-6, #7. That recommendation suggests either using online dockets or designating a single point of contact authorized to provide information about the status of petitions. The commenters further stated that FEMA should provide a permanent email address and telephone number at which interested members of the public can inquire about the status of petitions.

FEMA is interested in promoting more seamless interactions with the public in general, including this particular issue.¹² FEMA intends to experiment with an online docketing system, and does not believe it is appropriate to require such a system by regulation at this time. If FEMA establishes such a system, FEMA will include a link to the system at the webpage identified above. Similarly, although FEMA declines to include in regulation the name and/or phone number of a point of contact for all rulemaking petitions, FEMA is including an email address (fema-regulations@fema.dhs.gov) as a point of contact to confirm whether FEMA has received or responded to a specific rulemaking petition. FEMA may publish additional information on its website at a future date.

The commenters stated that FEMA may also consider making additional changes as recommended by ACUS, including detailing how FEMA will coordinate consideration of petitions with other processes used to determine agency priorities, such as the Unified

¹¹ See Admin. Conf. of the U.S., Recommendation 2014-7, *Petitions for Rulemaking*, 79 FR 75114 (Dec. 17, 2014).

¹² This interest is consistent with Executive Order 14058 “Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government,” 86 FR 71357 (Dec. 16, 2021).

Agenda and retrospective review of existing rules.¹³ As stated in § 1.8(b) of this final rule, if the FEMA Administrator finds that a petition contains adequate justification, a rulemaking proceeding will be initiated or a final rule will be issued as appropriate. Prioritization would be commensurate with the agency's regulatory priorities, as determined by the Administrator. FEMA does not believe that it is appropriate to include this internal process in regulation as such internal processes are exempt from the requirements of 5 U.S.C. 553 and should be subject to change at the Administrator's discretion.

The commenters also suggest further explaining what type of data and arguments are most useful for petitioners to provide to aid agency evaluation.¹⁴ The current and proposed regulations request the petition to provide the substance of the rule or amendment proposed, or specify the rule sought to be repealed or amended, and set forth all data and arguments available to the petitioner in support of the action sought. FEMA believes that this level of detail is sufficient. FEMA does not want to be overly prescriptive, considering the wide variety of changes that may be requested by a petitioner, and the wide variety of potential petitioners. The current regulations allow flexibility to the petitioner by providing general guidelines rather than dictating particular data points. If FEMA finds that a particular petition requires clarification or additional support before a determination can be made, it is its current practice to indicate such to the petitioner. This is consistent with ACUS Recommendation 2014-6, #6.

The commenters recommend inviting public comment on petitions as appropriate, consistent with ACUS Recommendation 2014-6, #8 and #9. FEMA has revised § 1.8 to make clear that it will consider on a case-by-case basis whether to solicit public comment on a petition. FEMA has further revised this section to clarify that the agency can take

¹³ ACUS Recommendation 2014-6, #2.

¹⁴ ACUS Recommendation 2014-6, #3.

action to accept comments, by removing text stating that “No public procedures will be held directly on the petition before its disposition.” In making the decision whether to solicit public comment on a petition, the agency will consider a variety of factors, including the nature and complexity of the petition, to determine if public comment is appropriate in advance of a decision on the petition. FEMA does not find it necessary to add a provision to the regulations regarding a specific public comment process for petitions given this change.

Finally, the commenters recommend posting additional information on FEMA’s website about how to submit petitions, consistent with ACUS Recommendation 2014-6, #16. As noted, FEMA has included a provision directing readers to the FEMA website. FEMA may, in its discretion, include additional information there.

Early and meaningful opportunity to participate in the development of rules

In the NPRM, FEMA proposed to remove § 1.4(d), which describes FEMA’s general policy of giving the public, including small entities and consumer groups, an early and meaningful opportunity to participate in the development of rules such as through advance notices of proposed rulemaking, holding open conferences, and convening public forums or panels. The NRECA submitted a comment expressing disagreement with FEMA’s proposal to remove this text. The NRECA stated that the current language creates the appropriate impression for the public and interested stakeholders looking to become involved in the process that FEMA is open to such participation.

Although FEMA is removing this section from its regulations, FEMA continues to support early and meaningful opportunity for the public to participate in the development of rules. As a matter of internal policy, FEMA sends copies of regulatory actions during the public comment period to publications likely to be read by those affected and solicits comment from interested parties by such means as direct mail.

FEMA does not plan to change this policy. FEMA also has a general internal policy of publishing requests for information and advance notices of proposed rulemaking as appropriate to the rulemaking project, specifically to give the public an early and meaningful opportunity to participate in the development of a rule. FEMA generally favors this approach for rules likely to be deemed significant under Executive Order 12866. FEMA followed this policy by publishing two requests for information related to the National Flood Insurance Program¹⁵ in advance of considering rulemaking and two advance notices of proposed rulemaking (one in 2016, one in 2017) for the public assistance program, in order to receive public input before FEMA fully developed the proposed rule.¹⁶ *See* 82 FR 4064 (Jan. 12, 2017); 81 FR 3082 (Jan. 20, 2016). The removal of the text streamlines the regulations and ensures the agency retains the flexibility to utilize a range of public engagement options in advance of rulemaking where appropriate.

Inclusion of the 60-day public comment period in the regulations

In the NPRM, FEMA proposed to remove § 1.4(e), which states FEMA's general policy of affording the public a 60-day comment period for notices of proposed rulemaking, unless the Administrator makes an exception and sets forth the reasons for the exception in the preamble to the notice of proposed rulemaking. The NRECA submitted a comment disagreeing with this proposed removal, stating that for the novice member of the public or interested stakeholder trying to become meaningfully involved in a process that will have impact on livelihoods and economic success or failure, there is no harm in including the length of the comment period in the regulations.

As stated in the NPRM, the 60-day comment period is recommended by Executive Order 12866. 60 days is also the time frame that FEMA generally follows.

¹⁵ *See* 86 FR 47128 (Aug. 23, 2021) and 86 FR 56713 (Oct. 12, 2021).

¹⁶ *See* 85 FR 80719 (Dec. 14, 2020).

While the comment period is specifically stated in each proposed rule when published in the *Federal Register* and the public would generally be reviewing the proposed rule that may impact them instead of FEMA's overall regulatory scheme, FEMA is retaining the 60-day comment period requirement in this final rule. FEMA still believes there are specific situations in which a shorter or longer comment period is appropriate. Such situations may include emergency situations where public comment is important, but the agency must still act in an expeditious manner for shorter comment periods. Longer comment periods may be appropriate for more technically complex, lengthy proposed rules. Longer comment periods may also be appropriate where the rulemaking may impact areas recently struck by a disaster to allow potentially impacted individuals more time to fully review the rulemaking. FEMA will continue to provide an explanation for departing from a 60-day comment period under the final rule, but consistent with other changes in this rule, will reserve discretion to depart from this standard as FEMA determines appropriate, in its discretion.

Bypassing notice and comment for good cause or for statements of policy, interpretive rules, and rules of organization and procedure

In the NPRM, FEMA proposed to remove § 1.4(f), which echoes the provisions of the Administrative Procedure Act to exempt from notice and comment rulemaking statements of policy, interpretive rules, and rules of organization and procedure, or to bypass notice and comment for good cause. The NRECA disagreed with the proposed removal for the reasons it disagreed with the proposed removals of § 1.4(d) and (e). As stated in the NPRM and as noted in response to Texas RioGrande's comment above, these exemptions are included in the Administrative Procedure Act and FEMA does not need to restate them in its regulations in order to follow them. As these are statutory exemptions, FEMA has the authority to exempt these items from rulemaking without regulations. As such, there is no need to repeat the exemptions in FEMA's regulations.

Periodic review of regulations

In the NPRM, FEMA proposed to remove § 1.8 which describes FEMA's intent to publish in the *Federal Register*, and keep updated, a plan for periodic review of existing rules at least within 10 years from the date of publication of a final rule. The NRECA disagreed with this proposal and recommended that FEMA update section 1.8 to indicate that FEMA will continue to participate in reviews of existing rules.

FEMA proposed to remove this section from part 1 because the process for review of existing rules has changed over time and may continue to change. FEMA has actively participated in retrospective reviews of existing regulations and will continue to do so. As the requirements are continually evolving, FEMA finds that including them in its rulemaking regulations would not be appropriate, as it would continually need to update the regulations as the requirements evolve and new executive orders are issued. This does not mean that the public will not be informed or involved, however. For example, in August 2011 DHS finalized a retrospective review plan that established a retrospective review process for seeking input from the public on a three-year cycle. Pursuant to that plan, DHS published *Federal Register* documents on February 26, 2014¹⁷ and October 11, 2016¹⁸ seeking public comment on existing regulations that DHS should consider as candidates for streamlining or repeal. Moreover, on June 15, 2017, FEMA published a *Federal Register* document requesting public input on its regulatory reform efforts.¹⁹ The agency also recently issued a request for information seeking input on FEMA's programs, regulations, collections of information, and policies and where the

¹⁷ 79 FR 10760. Comments received can be viewed on www.regulations.gov under docket ID DHS-2014-0006.

¹⁸ 81 FR 70060. Comments received can be viewed on www.regulations.gov under docket ID DHS-2016-0072.

¹⁹ 82 FR 27460. Comments received can be viewed on www.regulations.gov under docket ID FEMA-2017-0023.

public believes the agency should consider modifying, streamlining, expanding, or repealing.²⁰

In addition to FEMA's commitment to retrospective review of existing regulations, FEMA is obligated by law to perform periodic review of rules that have or will have a significant economic impact upon a substantial number of small entities. *See* 5 U.S.C. 610. Because this requirement is included in the Regulatory Flexibility Act, FEMA is statutorily bound to follow the requirement, regardless of whether the requirement is stated in the regulation. Eliminating this provision does not eliminate FEMA's requirement to follow the statutory requirement and reduces the potential confusion any statutory change to this requirement may cause until the regulation can be updated.

Review of the Regulatory Flexibility Analysis by the Small Business Administration

In the NPRM, FEMA proposed to remove § 1.13(c), which states that copies of regulatory flexibility analyses shall be furnished to the Chief Counsel for Advocacy of the Small Business Administration. The Regulatory Flexibility Act (RFA) requires agencies to transmit a copy of the initial regulatory flexibility analysis, or if the agency is certifying the rule, a copy of the factual basis for certification, to the Chief Counsel for Advocacy of the Small Business Administration.²¹ It is not necessary to include this statutory requirement in regulation. The NRECA disagreed with this removal, and recommended that FEMA retain the provision, because it informs members of the public who are trying to follow the rulemaking process and may not be aware of the ability of the Small Business Administration's Office of Advocacy to become involved. FEMA declines to incorporate the RFA's statutory requirements into regulation. As explained above, FEMA is streamlining these regulations and eliminating references to specific

²⁰ *See* 86 FR 21325 (Apr. 22, 2021).

²¹ 5 U.S.C. 603(a), 605(b).

statutory requirements as FEMA is already required to follow those provisions. Members of the public seeking more information on the RFA process can review the statutory requirements as the Act is cited in each rulemaking where it is applicable.

FEMA also notes that the RFA requires the agency to respond to any comments received from the Small Business Administration.²² The agency must provide the response to these comments in the final Regulatory Flexibility Analysis, which must be posted for public viewing, and a summary published in the *Federal Register*.²³ FEMA posts the final Regulatory Flexibility Analysis under the docket for the rule on www.regulations.gov, and a summary is also included in the preamble to the final rule. Therefore, the public has full visibility of any Small Business Administration involvement. FEMA concludes that it is not necessary to include this requirement in its regulations.

Adoption of a final rule: support for factual conclusions and adequately addressing public comments

In the NPRM, FEMA proposed to remove § 1.16(d)(2), which requires FEMA to make a determination that the factual conclusions upon which a final rule is based have substantial support in the agency record, viewed as a whole, with full attention to public comments in general and the comments of persons directly affected by the rule in particular. The NRECA disagreed with this proposed removal and recommended that this requirement be maintained as a testament to FEMA's attention to the record and stakeholder input in particular.

FEMA notes that the Administrative Procedure Act requires that a final rule take into consideration the relevant matter presented during the public comment period and requires the agency to provide a statement of the basis and purposes of the final rule.²⁴

²² 5 U.S.C. 604(a)(3).

²³ 5 U.S.C. 604(b).

²⁴ 5 U.S.C. 553(c).

This is a legal requirement that the agency must meet regardless of whether the requirement appears in the agency's own regulations on rulemaking. There is robust jurisprudence that has arisen out of this particular requirement of the Administrative Procedure Act, which has resulted in very detailed and thorough statements of bases and purpose in agency rulemakings.²⁵ FEMA concludes that this requirement is not necessary to be in regulation, as the agency is bound by law to meet it and the agency's internal controls ensure the requirement is met.

Availability of internal rulemaking procedures to the public

The NRECA objected generally to the proposed removal of regulations that reflect FEMA's internal policies because "those internal processes are not available to the public and therefore reduce transparency." The NRECA also stated its concern that reliance on internal processes means that a rulemaking process "will have a head start, gather a head of steam prior to stakeholders including the public being able to provide input, and therefore not truly open to public participation."

As noted earlier, FEMA does not expect that this rule will have any material impact on its public outreach as part of the rulemaking process. As a matter of policy, FEMA engages in a number of processes to ensure appropriate early and meaningful public participation. FEMA also publishes its planned regulatory actions semi-annually in the Unified Agenda. With respect to transparency and public access to non-regulatory policies, FEMA notes that www.fema.gov makes many FEMA policies available to the public, and that FEMA makes other internal documents available to the public as dictated by the Freedom of Information Act and other laws on public access to agency information. *See generally, e.g.,* 6 CFR part 5.

²⁵The statement of basis and purpose, commonly referred to as the "preamble," has become one of the primary documents that judges turn to in deciding the validity of challenged rules. *See A Guide to Federal Agency Rulemaking*, 6th ed., Jeffrey S. Lubbers, Part III, Chap. 8, B. *See, e.g., Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983); *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847 (D.C. Cir. 1987); *Action on Smoking & Health v. CAB*, 699 F.2d 1209 (D.C. Cir. 1983).

Change chart

The following chart lists the current section and its disposition via the final rule:

<u>Current section</u>	<u>Final rule</u>
<u>1.1 Purpose</u>	
1.1(a)	1.1(a)
1.1(b)	Removed
1.1(c)	Removed
1.1(d)	Removed
1.1(e)	Removed
<u>1.2 Definitions</u>	
1.2(a)	1.2(a)
1.2(b)	1.2(b)
1.2(c)	1.2(c)
1.2(d)	1.2(d)
1.2(e)	Removed
<u>1.3 Scope</u>	
1.3(a)	1.1(a)
1.3(b)	Removed
1.3(c)	1.1(b)
<u>1.4 Policy and Procedures</u>	Removed, except 1.4(b) and 1.4(e) moved to 1.3
<u>1.5 Rules docket</u>	
1.5(a)	1.4(a) & 1.5
1.5(b)	1.4(b)
<u>1.6 Ex parte communications</u>	
1.6 Introductory language	Removed
1.6(a)	1.6(a)
1.5(b)	1.6(b)
<u>1.7 Regulations agendas</u>	Removed
<u>1.8 Regulations review</u>	Removed
<u>1.9 Regulatory impact analyses</u>	Removed
<u>1.10 Initiation of rulemaking</u>	
1.10	1.8 / partially removed
<u>1.11 Advance notice of proposed rulemaking</u>	Removed
<u>1.12 Notice of proposed rulemaking</u>	Removed

<u>1.13 Participation by interested persons</u>	Removed
<u>1.14 Additional rulemaking proceedings</u>	1.7(c) / partially removed
<u>1.15 Hearings</u>	
1.15(a)	1.7(a) / partially removed
1.15(b)	1.7(b)
<u>1.16 Adoption of a final rule</u>	Removed
<u>1.17 Petitions for reconsideration</u>	1.9
<u>1.18 Petitions for rulemaking</u>	1.8

IV. Regulatory Analyses

Executive Orders 12866, 13563, and 13771

Executive Orders 12866 (“Regulatory Planning and Review”) and 13563 (“Improving Regulation and Regulatory Review”) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771 (“Reducing Regulation and Controlling Regulatory Costs”) directs agencies to reduce regulation and control regulatory costs and provides that “for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.”

The Office of Management and Budget (OMB) has designated this rule a “significant regulatory action” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by OMB.

This final rule revises FEMA regulations pertaining to rulemaking by removing sections that are outdated or do not affect the public and update provisions that affect the

public's participation in the rulemaking process. FEMA does not believe this rule imposes additional direct costs on the public or government.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), as amended, 5 U.S.C. 601-612, agencies must consider the impact of their rulemakings on "small entities" (small businesses, small organizations and local governments). When the Administrative Procedure Act requires an agency to publish a notice of proposed rulemaking under 5 U.S.C. 553, the RFA requires a regulatory flexibility analysis for both the proposed rule and the final rule if the rulemaking could "have a significant economic impact on a substantial number of small entities." The RFA also provides that in lieu of a regulatory flexibility analysis, the agency may certify in the rulemaking document that the rulemaking will not "have a significant economic impact on a substantial number of small entities" along with a statement providing the factual basis for such certification. FEMA has voluntarily published a notice of proposed rulemaking in this case, notwithstanding that this rule is a rule of agency organization, procedure, or practice exempt from notice and comment rulemaking requirements. *See* 5 U.S.C. 553(b)(A).

This rule revises FEMA regulations pertaining to rulemaking by removing sections that are outdated or do not affect the public and update provisions that affect the public's participation in the rulemaking process. This rule does not impose direct costs on small entities. Accordingly, and although FEMA is not required to make such certification, pursuant to section 605(b) of the RFA, 5 U.S.C. 605(b), the Administrator of FEMA certifies that this rule does not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 658, 1501-1504, 1531-1536, 1571, pertains to any notice of proposed rulemaking which implements any rule

that includes a Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. If the rulemaking includes a Federal mandate, the Act requires an agency to prepare an assessment of the anticipated costs and benefits of the Federal mandate. The Act also pertains to any regulatory requirements that might significantly or uniquely affect small governments. Before establishing any such requirements, an agency must develop a plan allowing for input from the affected governments regarding the requirements.

FEMA has determined that this rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, nor by the private sector, of \$100,000,000 or more in any one year as a result of a Federal mandate, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (PRA), as amended, 44 U.S.C. 3501-3520, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the agency obtains approval from OMB for the collection and the collection displays a valid OMB control number. *See* 44 U.S.C. 3506, 3507. FEMA has determined that this rulemaking does not contain any collections of information as defined by that Act. PRA regulations exempt general solicitations of comments from the public such as rulemakings. *See* 5 CFR 1320.3(h)(4).

Privacy Act/E-Government Act

Under the Privacy Act of 1974, 5 U.S.C. 552a, an agency must determine whether implementation of a proposed regulation will result in a system of records. A “record” is any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his/her education, financial transactions, medical

history, and criminal or employment history and that contains his/her name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. *See* 5 U.S.C. 552a(a)(4). A “system of records” is a group of records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. An agency cannot disclose any record which is contained in a system of records except by following specific procedures.

The E-Government Act of 2002, 44 U.S.C. 3501 note, also requires specific procedures when an agency takes action to develop or procure information technology that collects, maintains, or disseminates information that is in an identifiable form. This Act also applies when an agency initiates a new collection of information that will be collected, maintained, or disseminated using information technology if it includes any information in an identifiable form permitting the physical or online contacting of a specific individual.

This final rule does not create a new, nor impact a current, system of record. Therefore, this proposed rule does not require coverage under an existing or new Privacy Impact Assessment or System of Records Notice. Any member of the public or any non-Federal entity may submit comments on a rulemaking; all comments are posted on www.regulations.gov, and that website, as well as each FEMA rulemaking document requesting comments, includes a Privacy Notice informing the commenter that any comments will be posted for public viewing.

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments

Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” 65 FR 67249, November 9, 2000, applies to agency regulations that have Tribal implications, that is, regulations that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian Tribes, or

on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Under this Executive order, to the extent practicable and permitted by law, no agency shall promulgate any regulation that has Tribal implications, that imposes substantial direct compliance costs on Indian Tribal governments, and that is not required by statute, unless funds necessary to pay the direct costs incurred by the Indian Tribal government or the Tribe in complying with the regulation are provided by the Federal Government, or the agency consults with Tribal officials.

This rule does not have Tribal implications. Any member of the public and any non-Federal entity, including Tribes and Tribal members, may participate in Federal rulemaking as outlined in this proposed rule, and it is FEMA's policy that ex parte restrictions in rulemaking do not apply to Tribal consultations.

Executive Order 13132, Federalism

Executive Order 13132, "Federalism," 64 FR 43255, August 10, 1999, sets forth principles and criteria that agencies must adhere to in formulating and implementing policies that have federalism implications, that is, regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Federal agencies must closely examine the statutory authority supporting any action that would limit the policymaking discretion of the States, and to the extent practicable, must consult with State and local officials before implementing any such action.

FEMA has reviewed this rule under Executive Order 13132 and has determined that this rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore does not have federalism implications as defined by the Executive order. It addresses agency

procedures for rulemaking that affect the public; such rulemaking is a Federal process and does not affect State rulemaking processes.

Congressional Review of Agency Rulemaking

Under Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, also known as the Congressional Review Act (CRA), 5 U.S.C. 801-808, before a rule can take effect, the Federal agency promulgating the rule must submit to Congress and to the Government Accountability Office (GAO) a copy of the rule; a concise general statement relating to the rule, including whether it is a major rule; the proposed effective date of the rule; a copy of any cost-benefit analysis; descriptions of the agency's actions under the Regulatory Flexibility Act and the Unfunded Mandates Reform Act; and any other information or statements required by relevant executive orders. 5 U.S.C. 801(a)(1).

FEMA has sent this rule to the Congress and to GAO pursuant to the CRA. OMB's Office of Information and Regulatory Affairs has determined that this rule is not a "major rule" within the meaning of the CRA. 5 U.S.C. 804(2). It will not have an annual effect on the economy of \$100,000,000 or more; it will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and it will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

List of Subjects in 44 CFR Part 1

Administrative practice and procedure.

For the reasons discussed in the preamble, the Federal Emergency Management Agency revises 44 CFR part 1 to read as follows:

PART 1 – RULEMAKING, POLICY, AND PROCEDURES

Sec.

- 1.1 Purpose and scope.
- 1.2 Definitions.
- 1.3 Regulatory policy.
- 1.4 Public rulemaking docket.
- 1.5 Public comments.
- 1.6 Ex parte communications.
- 1.7 Hearings.
- 1.8 Petitions for rulemaking.
- 1.9 Petitions for reconsideration.

Authority: 5 U.S.C. 551, 553; 6 U.S.C. 101 et seq.; Department of Homeland Security Delegation 9001.1.

§1.1 Purpose and scope.

(a) This part contains FEMA's procedures for informal rulemaking under the Administrative Procedure Act (5 U.S.C. 553) that affect the public.

(b) This part does not apply to rules issued in accordance with the formal rulemaking provisions of the Administrative Procedure Act (5 U.S.C. 556, 557).

§1.2 Definitions.

(a) Rule or regulation have the same meaning as those terms are defined in the Administrative Procedure Act (5 U.S.C. 551(4)).

(b) Rulemaking means the FEMA process for considering and formulating the issuance, amendment, or repeal of a rule.

(c) Administrator means the Administrator, FEMA, or an official to whom the Administrator has expressly delegated authority to issue rules.

(d) FEMA means Federal Emergency Management Agency.

§1.3 Regulatory policy.

(a) It is the general policy of FEMA to provide for public participation in rulemaking regarding its programs and functions, including matters that relate to public property, loans, grants, or benefits, or contracts, even though these matters are not subject to a requirement for notice and public comment rulemaking by law.

(b) It is the general policy of FEMA that its notices of proposed rulemaking are to afford the public at least 60 days for submission of comments unless the Administrator makes an exception and sets forth the reasons for the exception in the preamble to the notice of proposed rulemaking.

(c) The general policies contained in this section are not intended to and do not create a right or benefit, substantive or procedural, enforceable against the United States or its agencies or officers. FEMA may depart from such policies in its absolute discretion, including for its annual grant programs and in other cases as circumstances warrant.

§1.4 Public rulemaking docket.

(a) FEMA maintains a public docket for each rulemaking after it is published in the *Federal Register* and until the rulemaking is closed and archived at the National Archives and Records Administration. The public docket includes every document published in the *Federal Register* in conjunction with a rulemaking. It also includes regulatory assessments and analyses, written comments from the public addressed to the merits of a proposed rule, comments from the public received in response to notices, or to withdrawals or terminations of a proposed rulemaking, requests for a public meeting, requests for extension of time, petitions for rulemaking, grants or denials of petitions or requests, and transcripts or minutes of informal hearings. The public rulemaking docket is maintained by the Regulatory Affairs Division, Office of Chief Counsel.

(b) After FEMA establishes a public rulemaking docket, any person may examine docketed material during established business hours by prearrangement with the Regulatory Affairs Division, Office of Chief Counsel, FEMA, 500 C St. SW., Washington, DC, 20472, and may obtain a copy of any docketed material (except for copyrighted material). FEMA also maintains a copy of each public docket electronically,

with the exception of copyrighted material, on www.regulations.gov. To access the docket on www.regulations.gov, search for the docket ID associated with the rulemaking.

(c) The docket for flood hazard elevation rules issued by the National Flood Insurance Program are partially maintained at the locality that is the subject of the rule. FEMA includes in the preamble of each flood hazard elevation rule the repository address for supporting material.

§1.5 Public comments.

A member of the public may submit comments via mail or courier to the Regulatory Affairs Division, Office of Chief Counsel, Federal Emergency Management Agency, 500 C St. SW., Washington, DC 20472, or may submit comments electronically to the rulemaking docket at www.regulations.gov under the applicable docket ID.

§1.6 Ex parte communications.

(a) All oral or written communications from outside the Federal Executive branch of significant information and argument respecting the merits of a rulemaking document, received after publication of a notice of proposed rulemaking, by FEMA or its offices and divisions or their personnel participating in the decision, must be summarized in writing and placed promptly in the public docket. This applies until the agency publishes a final regulatory action such as a withdrawal of the notice of proposed rulemaking or a final rule.

(b) FEMA may conclude that restrictions on ex parte communications are necessitated at other times by considerations of fairness or for other reasons.

(c) This section does not apply to Tribal consultations.

§1.7 Hearings.

(a) When FEMA affords an opportunity for oral presentation, the hearing is an informal, non-adversarial, fact-finding proceeding. Any rulemaking issued in a

proceeding under this part in which a hearing is held need not be based exclusively on the record of such hearing.

(b) When such a hearing is provided, the Administrator will designate a representative to conduct the hearing.

(c) The transcript or minutes of the hearing will be kept and filed in the public rulemaking docket.

§1.8 Petitions for rulemaking.

(a) Any interested person may petition the Administrator for the issuance, amendment, or repeal of a rule. For purposes of this section, the term person includes any member of the public and any entity outside the Federal Executive branch of Government. Each petitioner must:

(1) Submit the petition to the Regulatory Affairs Division, Office of Chief Counsel, FEMA, 8NE, 500 C Street, SW., Washington, DC, 20472;

(2) Label the petition with the following: “Petition for Rulemaking” or “Rulemaking Petition”;

(3) Set forth the substance of the rule or amendment proposed or specify the rule sought to be repealed or amended;

(4) Explain the interest of the petitioner in support of the action sought; and

(5) Set forth all data and arguments available to the petitioner in support of the action sought.

(b) FEMA will specify additional methods of submitting rulemaking petitions on its website at www.fema.gov/about/offices/chief-counsel/rulemaking and petitioners seeking to confirm whether FEMA has received or responded to a specific rulemaking petition may inquire at fema-regulations@fema.dhs.gov. The website may also contain other information about the petition for rulemaking process.

(c)(1) FEMA may solicit public comment on the petition in its discretion. If the Administrator finds that the petition contains adequate justification, a rulemaking proceeding will be initiated, or a final rule will be issued as appropriate. If the Administrator finds that the petition does not contain adequate justification, the petition will be denied by letter or other notice, with a brief statement of the ground for denial. The disposition will be posted on www.regulations.gov under docket ID FEMA-2022-0011.

(2) The Administrator may consider new evidence at any time; however, FEMA will not consider repetitious petitions for rulemaking.

§1.9 Petitions for reconsideration.

Petitions for reconsideration of a final rule will not be considered. Such petitions, if filed, will be treated as petitions for rulemaking in accordance with §1.8.

Deanne Criswell,
Administrator,
Federal Emergency Management Agency.
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